

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

-----: :  
SONY MUSIC ENTERTAINMENT, et al.,: :  
Plaintiffs, : :  
-vs- : Case No. 1:18-cv-950  
COX COMMUNICATIONS, INC., et al.,: :  
Defendants. : :  
-----: :

HEARING ON MOTIONS

April 5, 2019

Before: John F. Anderson, U.S. Mag. Judge

APPEARANCES:

Scott A. Zebrak and Jia Ryu, Counsel for the Plaintiffs

Thomas M. Buchanan, Counsel for the Defendants

1           NOTE: The case is called to be heard at 10:37 a.m.  
2 as follows:

3           THE CLERK: Sony Music Entertainment, et al. versus  
4 Cox Communications, Inc., et al., civil action number  
5 18-cv-950.

6           MR. ZEBRAK: Good morning, Your Honor. Scott Zebrak  
7 for the plaintiffs. And with me is my colleague Jia Ryu,  
8 R-y-u.

9           THE COURT: Good morning.

10          MR. BUCHANAN: Good morning, Your Honor. Thomas  
11 Buchanan on behalf of the defendant Cox Communications.

12          THE COURT: All right. Well, I've looked at all the  
13 pleadings that have been filed. I'm honestly unimpressed by  
14 the explanations provided by Cox as to why they didn't produce  
15 the information.

16          You know, if in fact -- I mean, the idea that things  
17 came up at some point -- and there is no description, nothing  
18 that is in the record here today that says when they asked the  
19 vendor to come in, what instructions they gave the vendor, what  
20 deadlines they gave the vendor, the time commitment that was  
21 taken to do these things within the three to four weeks in  
22 which the Court was told that they would need to have to do  
23 this -- you know, it certainly doesn't support a finding of  
24 diligence in trying to be responsive.

25          You know, and the idea that on March 7, three weeks

1 out, inquiries are made and told it was going to be in the next  
2 two weeks, and then two weeks come and go and, you know, it's  
3 still problematic. But it is what it is. 47 days later they  
4 produced information that should have been produced within  
5 three or four weeks.

6 I am not going to make the mistake of not setting a  
7 firm date going forward. So we'll make sure I don't make that  
8 same mistake twice in this case.

9 But all that said, what -- are you doing the  
10 deposition today or are you not doing the deposition today?

11 MR. ZEBRAK: We are doing the deposition today, Your  
12 Honor. However, we will not be able to address the data sets  
13 that they produced late Wednesday afternoon. And in fact, the  
14 designee for that deposition is an individual by the name of  
15 Sanford Mencher. He is a very senior person at Cox on the  
16 financial side. Cox has said that he will not be able to speak  
17 to the information they produced late Wednesday.

18 Instead, they want to have an individual by the name  
19 of Paul Jarchow come in and deal with this. And Cox has  
20 indicated to us late last night that they'll make him available  
21 next Wednesday.

22 THE COURT: Wednesday?

23 MR. ZEBRAK: Which is the date for the current expert  
24 report deadline --

25 THE COURT: That I can move. So this person -- how

1 do you pronounce his name again? The second one. Not the one  
2 that you're doing today. You're doing one today and then  
3 you're doing another one on Wednesday; is that right?

4 MR. ZEBRAK: Yes, Your Honor. I believe you  
5 pronounce it Jarchow.

6 THE COURT: Jarchow?

7 MR. ZEBRAK: J-a-r-c-h-o-w.

8 THE COURT: So if I order Mr. Jarchow to be deposed  
9 no later than Wednesday of next week, and give you until the  
10 following Friday, that is April 19, to do your expert reports,  
11 render your damages expert report, is that sufficient?

12 I'll give you a week -- that gives you eight days,  
13 nine days after the deposition of Jarchow to get that  
14 information to your expert and have him or her assimilate that  
15 into a report that you need to serve by Friday April 19.

16 MR. ZEBRAK: Yes, Your Honor. Two -- two things on  
17 that, if I could respond with.

18 One is with respect to the deposition. Cox indicated  
19 that we could depose Mr. Jarchow in a three-hour window on  
20 April 10, which is the expert report deadline, in Atlanta.  
21 Which we indicated would be problematic for us.

22 They, I believe, are --

23 THE COURT: Why?

24 MR. ZEBRAK: Well --

25 THE COURT: Getting to Atlanta is not that hard.

1 MR. ZEBRAK: Well, I will speak to that, but I would  
2 just like to append to it, Your Honor. But I believe walking  
3 in today, Cox has indicated that they might make him available  
4 to us in Washington, D.C., instead. I don't want to speak for  
5 Cox, Mr. Buchanan can.

6 The issue on our end, Your Honor, is that, you know,  
7 there are several expert reports all due the same day. And the  
8 individual who would be taking Mr. Jarchow's deposition is tied  
9 up on -- on several of them.

10 And so, we would -- we would certain -- and he's  
11 flying in from California anyway. So our view is, if he's  
12 flying in from California, there is no difference in flying to  
13 D.C. than to Atlanta. Cox's attorneys aren't in Atlanta  
14 anyway.

15 And with respect to the timing. You know, there is  
16 no magic about the exact two-week request we had. What I would  
17 ask is rather than that Friday, that we do it on the Monday  
18 afterward.

19 And if I could just say something about the reason  
20 for that extra few day period, Your Honor. Is that right now  
21 we have the data sets, but they're not -- you know, they don't  
22 come with a User Guide. They are complicated. There is  
23 millions of data records. There is no field for an ICOMS ID.

24 Late last night we were told that if we combine  
25 certain fields, we can transform into that into an ICOMS ID.

1 But we need to work with this data, and then we need to,  
2 importantly, reconcile it against hundreds of thousands of  
3 notices and other material that Your Honor compelled them to  
4 produce back in February with regard to infringement notices  
5 about our subscribers -- their subscribers that were  
6 infringing.

7 So it really is a complicated analysis. And my  
8 concern is that they'll be the first ones to attack whether our  
9 expert understood the data, was careful, was thorough, was  
10 accurate.

11 So I would ask just that we push it to that Monday.  
12 And to the extent that their expert has two to three weeks  
13 rather than four for his rebuttal report, for a whole host of  
14 reasons this is a problem of Cox's own making. And to the  
15 extent anyone should be prejudiced from it, it should be them,  
16 not us.

17 THE COURT: Okay. Mr. Buchanan, what do you have to  
18 say?

19 MR. BUCHANAN: Well, Your Honor, we have been having  
20 discussions about the production of this information for weeks.  
21 And we did project three to four weeks at the hearing on  
22 February 15. And then we had problems producing it.

23 The Court doesn't find that we were specific enough  
24 with regard to those problems, but it is a lengthy document  
25 that we had to create. We did get a vendor. We did get it to

1       them. We told them we would get it to them.

2               They are -- they just noticed a 30(b)(6) doc --  
3       depositions on 49 different topics on March 20 and scheduled  
4       them for April 1. So they wanted us to produce six or seven  
5       corporate 30(b)(6) witnesses on April -- the week of April 1.

6               So we've given them the names of all the witnesses.  
7       We've given them the topics as to the Vice-President of  
8       Finance, that's Mencher. And so, he's going to be deposed  
9       today.

10              And then we said Jarchow could testify today by video  
11       conference. You have the document -- remember, this is just a  
12       document, as the Court ordered. It is -- it has a lot of data  
13       points, but it's all just records of individual accounts and  
14       revenue.

15              I mean, so it's not like they're going to go through  
16       an expert and say, let's go through line 1, who is this? How  
17       much money is this? The Vice-President of Finance today is  
18       going to testify about profits and losses and different  
19       accounts and all of that information. He testified in the last  
20       case, they have that deposition, and they have his trial  
21       testimony.

22              So we proposed that. So then we said, okay, let's  
23       try to do it next week in Atlanta. So that's what we would  
24       like to stick to.

25              And if the Court says that doesn't work, then we'll

1 make an accommodation. But I don't know why the witness  
2 couldn't testify from California by video conference on this  
3 one single document, just explain what it is and what their  
4 columns are.

5 In terms of the ICOMS number, we told them it's the  
6 first two columns. It says, Account Number and Item Number,  
7 and you just add the numbers. And that's the ICOMS number.  
8 It's not that complicated.

9 And I just don't see them going through with a  
10 witness over all of this information. They're going to ask  
11 him, what's this chart? Can you tell us what these columns  
12 mean. Although I think they are -- they self-identify  
13 themselves.

14 So we had proposed that we do the deposition in  
15 Atlanta, and that Your Honor's proposal of that Friday would be  
16 a fair extension. And we actually offered them a week  
17 extension. And even in the most recent e-mail from Mr.  
18 Oppenheim he says, give us a week, even though their motion  
19 says two weeks.

20 So we think what the Court initially proposed is fair  
21 and that they can do the deposition in Atlanta. If the Court  
22 wants to do something else, we will obviously do what the Court  
23 tells us.

24 But if you push it off to that Monday, I think we  
25 should get some time. We did not act in bad faith. I mean, we



1 worked at this. You know, I think that we worked as quickly as  
2 we could. Remember, we're producing a lot of other  
3 information, you know, an extensive amount of financial  
4 information. And that is going to be part of the deposition  
5 today.

6 So that's what we request, Your Honor. Thank you.

7 THE COURT: Okay. All right. Well, Mr. Zebrak.

8 MR. ZEBRAK: Your Honor, both with respect to the  
9 specific issue of the scheduling of the expert deadlines and  
10 our motion more broadly, you know, I just need to respond  
11 because those -- I mean, Your Honor has heard, you know,  
12 thousands or tens of thousands or hundreds of thousands of  
13 disputes like these, but, you know, those are simply --

14 THE COURT: Not hundreds of thousands, thankfully.

15 MR. ZEBRAK: Well --

16 THE COURT: Many, I will just put it as many.

17 MR. ZEBRAK: Probably more than Your Honor cares to  
18 count.

19 Your Honor knows when -- when a party is simply  
20 bringing forward broad platitudes rather than specific facts.  
21 And time and again in response to these motions that's what  
22 happens. It's a playbook where they string everything out.  
23 We're the ones who suffer prejudice.

24 You know, this data is not self-defining. If it was  
25 self-defining, we would have known how to cobble it together,

1 the ICOMS ID. These are complicated fields, but suddenly Cox's  
2 lawyers are experts on what's self-defining or not to financial  
3 experts, and it's just not true.

4 And if this data were so easy to explain, they  
5 wouldn't need to fly a witness in across the country rather  
6 than have their deponent handle it today in Atlanta.

7 And it absolutely is not true that they were having  
8 discussions with us about this data and its production. We  
9 have been chasing after them. Your Honor see the  
10 correspondence chain.

11 The day before we filed our sanctions motion they  
12 finally said there was an issue with backup tapes. But as Your  
13 Honor has seized upon, they put declarations in to the Court  
14 that are so general and conclusory that they're  
15 counterproductive. We pointed that out on the motion to compel  
16 when they put in similar such declarations after they had said,  
17 we have it, we'll produce it, but then months later they said  
18 they didn't.

19 And here, they are slow-rolling this. They don't  
20 want to -- and, you know, we're the ones suffering prejudice.

21 So we'd ask that we not suffer prejudice on our reply  
22 report by having less time by dint of extending their rebuttal  
23 report, but that we keep all deadlines the same except for  
24 moving it to the -- to the Monday we suggested, Your Honor.

25 Thank you.

1 THE COURT: Well, I am go ahead and order that  
2 Jarchow be deposed on Wednesday -- no later than Wednesday  
3 April 10, and no time limit. I am not going to set a time  
4 limit of three hours. I think whatever it takes to get the  
5 information, the limited information that you need from  
6 Jarchow. Whether it's in Atlanta or D.C., you all can work  
7 out, but it has to be done by Wednesday April 10.

8 I am going to extend the deadline for the plaintiff  
9 to provide their damages expert report based on the delay in  
10 getting the information to them to Friday April 19.

11 That is not going to impact the defendants'  
12 requirement to serve their expert report by -- their opposing  
13 expert report by May 8. So the time period is going to be  
14 reduced. But I suspect under the circumstances that's maybe  
15 the best way to handle this.

16 You will have until the 19th. That's more than a  
17 week after the deposition gets taken. You have had the  
18 information now for several days. So you would have had at  
19 least the beginning parts of that information two weeks before  
20 that expert report.

21 Okay? Anything else in this case?

22 MR. BUCHANAN: No, Your Honor. Thank you.

23 THE COURT: Okay. Mr. Zebrak.

24 MR. ZEBRAK: Yes, Your Honor. I am not revisiting  
25 the issues that we just covered, but on February 15 Your Honor

1 ordered them to explain something about their realization rates  
2 with respect to billings. It was --

3 THE COURT: Well, that isn't a part of this motion.  
4 I'm not sure I can really deal with it. Is it?

5 MR. ZEBRAK: Well, I mean, it is, Your Honor, in the  
6 sense that, you know, we only obtained this data by dint of  
7 filing the motion for sanctions. And we had understood that  
8 when they provided the data, they would explain to us the  
9 realization rates as Your Honor ordered them to do.

10 So as we filed the motion, we -- you know, we didn't  
11 know that we would receive the data at all. And what we  
12 understand is that they have no intention of giving us the  
13 information. And said -- instead they said, we can depose one  
14 of their witnesses who will be prepared to speak to the  
15 questions at deposition.

16 And what our fear is, Your Honor, is that we end up  
17 with murky testimony, ridden with objections from counsel,  
18 rather than a clear explanation as the Court ordered. Which  
19 was the predicate to allow them to produce billing information,  
20 not -- not the actual revenue data. And the idea was, come at  
21 trial, Your Honor didn't want them to play cute and say, well,  
22 we didn't collect that, it's just billings.

23 And, you know, again, we just have no answer. And  
24 they're taking liberties and not doing as the Court ordered.  
25 And that's part and parcel of this.

1 THE COURT: Well, we'll see what you get out of the  
2 deposition and then deal with this. If it's not adequate, then  
3 we'll deal with that issue on another day when the record is  
4 something that I can look at to make a decision.

5 MR. ZEBRAK: Yes, Your Honor.

6 THE COURT: I ordered certain things to be done. I  
7 didn't set the timing of it -- it's what, typically it would be  
8 11 days from the date the order gets entered is the normal  
9 rule.

10 But the one having to do with the financial  
11 information, I just know all -- that it couldn't be done in the  
12 time indicated. Your motion didn't really, honestly,  
13 specifically identify a particular document request that I  
14 ordered them to provide information that they didn't provide  
15 information.

16 So if the issue is the person being deposed today or  
17 next week is going to be providing you with that kind of  
18 information, and it's going to be him relying on that to be  
19 compliant with my order to produce the realization rates and  
20 those kinds of things -- you know, if they don't do that, then  
21 you come back and ask for further relief.

22 But, you know, I need to have a record. I need to  
23 know what it is that you're asking me to do specifically.  
24 That's the best way to deal with this case. Okay?

25 MR. ZEBRAK: Understood. Thank you, Your Honor.

1 THE COURT: Thank you. Court will be adjourned.

2 NOTE: The hearing concluded at 10:53 a.m.

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6  
7 C E R T I F I C A T E o f T R A N S C R I P T I O N

8  
9 I hereby certify that the foregoing is a true and  
10 accurate transcript that was typed by me from the recording  
11 provided by the court. Any errors or omissions are due to the  
12 inability of the undersigned to hear or understand said  
13 recording.

14  
15 Further, that I am neither counsel for, related to,  
16 nor employed by any of the parties to the above-styled action,  
17 and that I am not financially or otherwise interested in the  
18 outcome of the above-styled action.

19  
20  
21  
22 /s/ Norman B. Linnell  
23 Norman B. Linnell  
24 Court Reporter - USDC/EDVA  
25